BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL F. BARBER	)	
Claimant	)	
V.	)	
	)	
HF RUBBER MACHINERY, INC.	)	Docket No. 1,066,302
Respondent	)	
AND	)	
	)	
CONTINENTAL CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of Administrative Law Judge Rebecca Sanders' November 26, 2013 preliminary hearing Order. John J. Bryan of Topeka, Kansas, appeared for claimant. James R. Hess of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the September 9, 2013 deposition of David R. Hasvold, as well as the September 11, 2013 and November 25, 2013 preliminary hearing transcripts and exhibits thereto, in addition to all pleadings contained in the administrative file.[1]

ISSUES

A preliminary hearing was held September 11, 2013. In a September 12, 2013 preliminary hearing Order, the judge ruled claimant did not provide timely notice for his injury by repetitive trauma. A second preliminary hearing was held November 25, 2013, followed by an Order denying benefits for the following reasons:

> First of all, Claimant and employer can maintain and call their relationship employer/employee if they wish. However, the facts are Claimant has not worked or performed services or received wages or benefits since June 23, 2013.
>
> Secondly, a hearsay statement from Dr. Huang that "carpal tunnel is usually work related" is not sufficient to find that Claimant's condition in particular is work related. Further, such a hearsay statement is not corroborated by his written report.
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> The date of accident is June 23, 2013. Claimant did not provide the employer proper notice until July 26, 2013.[2]

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[1] Pages 2-3 of respondent's brief references claimant's September 6, 2013 deposition, but it is not part of the record and was not considered by the Board.

[2] ALJ Order (Nov. 26, 2013) at 5-6.

Claimant requests the preliminary hearing Order be reversed. Claimant argues notice was timely when he advised his supervisor, David Hasvold, on June 18 or 19, 2013, that he was having problems with his right hand. In the alternative, claimant asserts his date of injury by repetitive trauma is July 10, 2013, because that is when he says he was first advised by a physician that his condition was work related, and notice on July 26, 2013 was timely. Respondent maintains the preliminary hearing Order should be affirmed.

The issues for the Board's review are:

(1) What is the date of claimant's injury by repetitive trauma?

(2) Did claimant provide timely notice?

FINDINGS OF FACT

Claimant began working for respondent as a millwright in May of 2007 or 2008. His job required significant use of his hands to install and repair rubber mixing equipment. Claimant was hired as a part-time employee to work projects in the United States, Mexico and Canada. Between projects, claimant would be laid off and collect unemployment benefits until recalled for another project.

In approximately March 2013, claimant began having symptoms in his right hand while on a project in New York. He continued to work and his symptoms worsened. The project ended in May 2013. On May 12, 2013, claimant woke up with pain, numbness and tingling in his right hand. He went to Stormont Vail emergency room where they took an x-ray, immobilized his right hand and wrist and prescribed anti-inflammatory drugs. He was referred to Dr. Gilbert. On May 26, 2013, Dr. Gilbert diagnosed claimant with tendonitis and recommended continued immobilization and anti-inflammatory drugs. Claimant testified that at no time between May 12, 2013 and June 16, 2013 did he advise anybody at respondent that his right hand was hurting or ask for medical treatment.

On June 16, 2013, claimant began working on a project in Mexico which lasted approximately one week. During this time, claimant experienced a lot of pain in his right hand, especially at night, which caused him difficulty sleeping. Claimant testified he told his supervisor, David Hasvold, about his hand problems on June 18 or June 19, 2013:

> Q. Describe how those conversations took place.
>
> A. I was sitting on a cooler drinking a bottle of water because it was extremely hot in Mexico and he walked over to me and asked me if I was okay, so I responded to him that I was hot and that my right hand was bothering me, and he responded back to me to finish drinking my water and we'll just work through it.[3]

[3] P.H. Trans. (Sep. 11, 2013) at 21-22.

Claimant testified to his belief that he had provided notice to respondent prior to his return to the United States from Mexico.[4]

Because of the heat in Mexico, Mr. Hasvold was told to watch everybody and make sure they took breaks and drank plenty of liquids to avoid getting overheated. He acknowledged conversations with claimant about the heat, but did not recall claimant telling him that his right hand or any hand was hurting. He testified he was required to report any injury, and claimant never reported an injury nor requested medical treatment for his hand or hands and never complained of his hand or hands due to work.[5] He denied ever ignoring the claimant. Mr. Hasvold testified he was first notified that claimant was having problems with his hand or hands several weeks after returning from Mexico by John Adams or Jolene Gochenour, representatives of respondent. He testified claimant is generally an honest person.

The last day claimant physically worked in Mexico was June 22, 2013. Prior to leaving, Mr. Hasvold told claimant not to turn in his work visa because they would be returning to Mexico in about a month for additional work. On June 23, 2013, claimant flew back to the United States. Respondent paid for the flight, per diem, mileage and parking.

On June 24, 2013, claimant went to the Stormont-Vail emergency room with swelling and pain in his right index and middle finger. Claimant testified the attending physician told him to return to Dr. Gilbert because he might have carpal tunnel syndrome.

Claimant returned to Dr. Gilbert on July 1, 2013, and was referred to Dr. Huang for an EMG. The EMG dated July 10, 2013 showed severe carpal tunnel in his right wrist.[6] Claimant testified Dr. Huang told him carpal tunnel syndrome "is usually a work-related injury."[7] Claimant indicated this was the first time he was told he had a work-related injury.

Claimant filed an application for hearing on July 26, 2013 alleging injuries from repetitive trauma through June 22, 2013. Claimant testified he did not report any problems with his right hand to anybody besides Mr. Hasvold in a management capacity, nor did he file anything with respondent claiming any type of injury other than the application for hearing that was file stamped July 26, 2013.[8] At the second preliminary hearing, claimant sought to amend the date of injury by repetitive trauma to July 10, 2013, based on when he indicated Dr. Huang advised him that his condition was work related.

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[4] P.H. Trans. (Nov. 25, 2013) at 23.

[5] See Hasvold Depo. at 9-11.

[6] P.H. Trans. (Sep. 11, 2013), Cl. Ex. 1.

[7] P.H. Trans. (Nov. 25, 2013) at 17.

[8] P.H. Trans. (Sep. 11, 2013) at 27.

Jolene Gochenour is the director of finance for respondent and responsible for all workers compensation claims. She testified she first became aware that claimant was filing a claim for a worker's compensation injury when she received a July 25, 2013 letter from his attorney on July 26, 2013.

Ms. Gochenour testified part-time employees are not actively terminated until they have not worked for over six months. Since claimant was a part-time employee, he is still considered an employee of respondent on the books, whether he works or not, until six months from June 23, 2013. Ms. Gochenour confirmed that claimant has not performed services or received wages since June 23, 2013.[9]

On September 17, 2013, claimant was seen at his attorney's request by Dr. Ketchum. Dr. Ketchum diagnosed claimant with severe right carpal tunnel syndrome and significant stenosing tenosynovitis of the right second to fifth digits. Dr. Ketchum recommended a right carpal tunnel release and a release of the A1 pulleys right second through fifth digits. Dr. Ketchum opined claimant's highly repetitive work at respondent was the prevailing factor in causing claimant's injuries and need for surgery.

Claimant testified he has not been called back to work by respondent since returning from Mexico, nor has he contacted them about additional work. He is currently receiving unemployment benefits.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508(e) states in part:

> "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

[9] *Id.*, Resp. Ex. A.

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2012 Supp. 44-520, as amended by S.B. 187 on April 25, 2013, states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

This Board Member affirms the preliminary hearing Order. Claimant's date of injury by repetitive trauma was June 23, 2013. Claimant provided notice on July 26, 2013, over a month later and beyond 10 days after his last actual day worked. Notice was not timely.

Claimant sets forth a number of arguments regarding date of injury by repetitive trauma and notice.

Claimant argues his date of injury by repetitive trauma is July 10, 2013, which is when Dr. Huang told him that carpal tunnel syndrome is usually a work-related injury. Dr. Huang did not testify. K.S.A. 44-508(e)(3) affixes a date of injury by repetitive trauma when a physician advises a claimant that his or her condition *is* work related. Dr. Huang may have told claimant that, in general, many instances of carpal tunnel syndrome are due to work activity, but the current record does not establish that the doctor told claimant that his own condition was work related. Additionally, it is evident the judge placed more weight in Dr. Huang's written report, which contained no mention of a work-related injury, as opposed to statements claimant attributed to Dr. Huang.

Claimant also argues he provided notice of his injury on either June 18 or June 19, 2013, based on his statement to his supervisor that his right hand was hurting. If claimant had provided notice during the pendency of an ongoing series of repetitive trauma, respondent would have actual knowledge of the associated injury. However, the current record does not establish that claimant advised his supervisor that he was claiming benefits under the workers compensation act or suffered a work-related injury. A complaint of pain, standing alone, does not establish notice. In fact, claimant argues he did not know he had a work-related injury until advised by Dr. Huang on July 10, 2013. If claimant did not know he had a work-related injury until July 10, 2013, it would be difficult for him to provide notice of repetitive trauma to his supervisor on June 18 or June 19, 2013.

Claimant also argues a date of injury by repetitive trauma cannot be June 23, 2013, claimant's last day worked, because claimant was still employed by respondent on that date. Claimant suggests "last day worked" in K.S.A. 2012 Supp. 44-508(e)(4) really means "last day employed," and because claimant is still employed, the last day worked criteria cannot be used to determine date of injury by repetitive trauma.

This Board Member disagrees with claimant's analysis, largely based on Board Member Arnhold's ruling in *Brooks*.[10] In such case, a claimant asserted his date of injury by repetitive trauma was not October 27, 2011, his last day worked, but rather November 18, 2011, his last day employed. The earlier date of injury by repetitive trauma resulted in notice being one day too late. Board Member Arnhold concluded, "The plain and

[10] *Brooks v. Hawker Beechcraft, Inc.*, No. 1,059,392, 2012 WL 2890476 (Kan. WCAB June 22, 2012).

unambiguous meaning of the term 'last day of actual work' is the last day an employee physically performs work activities for his or her employer. The definition of 'works for' put forth by claimant is overly broad." This Board Member is not sure it is necessary to predicate the last day worked as the last date a claimant performs physical work activities (the statute mentions "actual work"), but June 23, 2013 was claimant's last day of actual work. June 23, 2013 is claimant's date of injury by repetitive trauma.

From his last actual work day, claimant would have needed to provide notice by July 3, 2013, ten calendar days later. Claimant argues he cannot be expected to provide notice to his employer before he was advised by Dr. Huang that he had a work-related condition on July 10, 2013. Claimant argues strictly construing the Act to find a date of injury by repetitive trauma before he was aware a potential claim existed is unreasonable, unjust and unconscionable. As for such arguments founded in equity, the Board must follow the law as written. The Board must follow the mandate of *Bergstrom:*

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785, 189 P.3d 508.
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> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[11]

The Board's exercise of authority is based on statute; the Board does not have the inherent power to rule on how or what it thinks plain and unambiguous laws should be.[12] The entire Board agrees that if claimant did not know he had a claim until July 10, 2013, concluding timely notice was not provided within ten days of claimant's last actual day worked, i.e., before he knew he had a viable claim, is a harsh result. However, we are limited to applying the law as written.

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[11] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[12] See *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311, 316 (2013); *Bergstrom*, 289 Kan. at 607-08; *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 396-97, 44 P.3d 330 (2002); *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010) (Despite the Board's "arguably sound" reasoning that there be a nexus between injury and wage loss to establish eligibility for a work disability award, Kansas Supreme Court precedent required the law to be applied as written.).

Claimant also makes a number of arguments centering on the Kansas Workers Compensation Act being unconstitutional for violating due process and equal protection, including that the Act violates due process for failing to provide an adequate or reasonable remedy. The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. This issue cannot be ruled upon by this Board Member. Claimant may preserve the arguments for future determination before a proper court.

CONCLUSIONS

Claimant's date of injury by repetitive trauma was June 23, 2013. He provided notice on July 26, 2013. Based on the current evidence, claimant did not provide notice within ten days after his last actual work day.

DECISION

WHEREFORE, the undersigned Board Member affirms the November 26, 2013 preliminary hearing Order.[13]

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: John J. Bryan
janet@ksjustice.com

James R. Hess
KSX1DWCNotices@CNA.com
james.hess@cna.com

Honorable Rebecca Sanders

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.